

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN TUBBS, JOSEPH DIBEE,
JOSEPHINE S. OVERAKER, JUSTIN
SOLONDZ, and BRIANA WATERS,

Defendants.

Case No. CR05-5828FDB

ORDER DENYING DEFENDANT
WATERS' MOTION TO LIMIT
COUNT 6 OF THE INDICTMENT TO
ARSON OF A BUILDING USED IN
INTERSTATE COMMERCE

Defendant Waters moves to limit Count 6 (charging use of a destructive device during a crime of violence pursuant to 18 U.S.C. § 924(c)) of the Fourth Superseding Indictment to arson of a building used in interstate commerce as charged in Count 5. Because of the five-year statute of limitations for violations of 18 U.S.C. § 924(c), Waters argues that Count 7 charging arson of a building belonging to an institution receiving Federal financial assistance, which has a ten-year limitation period, would impermissibly expand the predicate for a crime of violence under Section 924(c), which has a five-year limitation period. Defendant concedes that Counts 5 and 6 are within the five-year limitation period.

The Government argues that the language of Count 6 identifies the predicate offense only as

1 “the arson of the Center for Urban Horticulture at the University of Washington”; the count does not
2 allege that this predicate offense involved destruction of a building in interstate commerce or that it
3 involved destruction of a building of an institution receiving Federal financial assistance (18 U.S.C §§
4 844(i) & (f), respectively.

5 Defendant Waters counters the Government’s response arguing that “arson” is not in and of
6 itself a crime, that it must refer to a specific offense, under a particular criminal code, with particular
7 elements. Thus, the only arson offense that Waters was accused of in Count 5 was arson of a
8 building in interstate commerce. Waters concludes that the import of the difference is providing
9 notice to an accused, and Waters only received notice that she was charged with arson of a building
10 in interstate commerce, § 844(k) and use of a destructive device during that arson under § 924(c),
11 and, therefore, that she is “entitled to the mental repose of not having to stand trial on a § 924(c)
12 charge based upon an arson predicated on some other statutory section.”

13 In *United States v. Randall*, 171 F.3d 195 (4th Cir. 1999), the Court noted that the
14 Government has no obligation to specify the particular crime of violence underlying the 18 U.S.C. §
15 924(c) charge, but that

16 if the government specifies in the indictment the § 924(c) predicate offense on which
17 it is relying, “[a] conviction that rests, no matter how comfortably, on proof of
another [predicate] offense cannot stand.

18 *Id.* at 205. In *Randall*, the indictment specified that the predicate offense of distribution of a
19 controlled substance, but the jury instructions allowed conviction based on a different predicate
20 offense – possession with intent to distribute – therefore, the Court reversed the convictions.

21 Waters acknowledges *Randall*, but argues that in the Second Superseding Indictment, the
22 only arson offense that Waters was accused of committing was in Count 5, arson of a building in
23 interstate commerce; therefore, Count 6 must have been based on such arson.

24 A reading of Count 6 reveals that Waters’ argument lacks merit. Count 6 charges use of “a
25 destructive device (an incendiary bomb), during and in relation to a crime of violence, to wit: the

1 arson of the Center for Urban Horticulture at the University of Washington, a crime for which they
2 may be prosecuted in a court of the United States.” Count 6 provides notice that the use of a
3 destructive device during a crime of violence in relation to the arson of the Center for Urban
4 Horticulture at the University of Washington is being charged, and there is no qualification that the
5 building involved interstate commerce or that the building belonged to an institution receiving
6 Federal financial assistance. Count 5 is separate from Count 6, and Count 6 is sufficiently
7 informative of the offense charged.

8 ACCORDINGLY, IT IS ORDERED: Motion of Defendant Waters to Limit Count 6 of the
9 Fourth Superseding Indictment To Arson of A Building Used in Interstate Commerce [Dkt. # 170] is
10 DENIED.

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12 DATED this 17th day of September, 2007.

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15 FRANKLIN D. BURGESS
16 UNITED STATES DISTRICT JUDGE
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